MOTION FILED
JUL 10 1989

No. 88-1769

In the Supreme Court of the United States

OCTOBER TERM, 1989

MASSACHUSETTS MUNICIPAL WHOLESALE ELECTRIC COMPANY, PETITIONER

v.

VERMONT DEPARTMENT OF PUBLIC SERVICE, ET AL., RESPONDENTS

On Petition for a Writ of Certiorari to the Supreme Court of Vermont

MOTION FOR LEAVE TO FILE BRIEF FOR CONTINENTAL BANK N.A., BOND FUND TRUSTEE, AS AMICUS CURIAE AND BRIEF AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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MOTION FOR LEAVE TO FILE BRIEF FOR CONTINENTAL BANK N.A., BOND FUND TRUSTEE, AS AMICUS CURIAE IN SUPPORT OF PETITIONER

Pursuant to Rule 36 of the Rules of this Court, Continental Bank N.A., as Bond Fund Trustee for the holders of bonds issued by Massachusetts Municipal Wholesale Electric Company ("MMWEC"), requests leave to file the accompanying brief as *amicus curiae* in support of petitioner. Counsel for petitioner has consented to the filing of this brief, but counsel for respondents have refused consent.

Continental Bank is the Bond Fund Trustee of almost $1.5 billion in MMWEC revenue bonds, approximately $517 million of which were issued to finance the construction of a nuclear power plant at Seabrook, New Hampshire. The applicable General Bond Resolution authorizes the Bond Fund Trustee to take steps it deems appropriate for the protection and enforcement of the rights of the bondholders.

The primary sources for repayment of the bonds are the revenues from municipalities and utilities in Vermont, Massachusetts, Maine, and Rhode Island that, under power sales agreements, agreed to defray the cost of construction of the power plant. The judgment of the Supreme Court of Vermont jeopardizes those sources of repayment in two respects. First, that judgment purports to relieve the Vermont participants of their obligation to make payments under their power sales agreements, thereby potentially reducing the sources for repayment by approximately 20%. Second, certain Massachusetts utilities and municipalities have asserted, based upon the judgment below, that they also are excused from making payments under their power sales agreements.

The Bond Fund Trustee submits this brief as *amicus curiae* in light of the potential threat to the repayment of the revenue bonds at issue in this case as well as to the stability of the bond market for similar publicly financed projects around the United States.

For the foregoing reasons, the motion of Continental Bank for leave to file the accompanying brief as *amicus curiae* in support of petitioner should be granted.

Respectfully submitted.

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JULY 1989

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BRIEF FOR CONTINENTAL BANK N.A., BOND FUND TRUSTEE, AS AMICUS CURIAE IN SUPPORT OF PETITIONER

INTEREST OF THE AMICUS CURIAE

Continental Bank N.A. is the Bond Fund Trustee of approximately $517 million in revenue bonds whose primary source of repayment is the revenue received under the power sales agreements at issue in this case. As described more fully in the accompanying motion for leave to file this *amicus* brief, the decision of the Vermont Supreme Court potentially threatens the interests of the bondholders.

ARGUMENT

THE VERMONT SUPREME COURT'S FAILURE TO ALLOW CONSIDERATION OF PETITIONER'S FEDERAL CONSTITUTIONAL DEFENSES SHOULD NOT BE PERMITTED TO STAND

This case concerns respondents' attempt to abrogate long-term contracts with petitioner for the financing of public power projects. Among other defenses, petitioner contended that the invalidation of the contracts would violate the federal Constitution. The Vermont Supreme Court held that the contracts were void as a matter of state law and entered final judgment against petitioner *even though no court had passed upon petitioner's federal defenses.* The failure of the court below to allow consideration of petitioner's federal claims violates the Constitution and warrants relief from this Court.

A. The Vermont Supreme Court Committed Constitutional Error In Failing To Allow Consideration Of Petitioner's Federal Defenses

1. This case involves "take-or-pay" contracts between petitioner and several municipalities and utilities in Vermont, Massachusetts, Maine, and Rhode Island. These so-called "power sales agreements" ("PSAs") provide for the sale by petitioner of shares of "project capability" (as defined in the PSAs, see Pet. 5) in electrical generating plants. Petitioner uses the revenues received under the PSAs to pay the principal and interest on bonds it issued to finance its power supply system. As petitioner stated in its brief in the Vermont Supreme Court (at 14), "[t]he take-or-pay provisions are necessary in order to permit [petitioner] to sell its bonds to investors," since "[i]t is by virtue of the take-or-pay provisions of the [PSAs] that the participants under-

take their proportionate share of the financing and construction risk" for the project.

Some six years after the PSAs were executed, respondents brought this suit to challenge the validity of the PSAs. Petitioner defended on the ground that the contracts were valid as a matter of Vermont law. Petitioner also contended that, if the contracts were invalidated under state law, that result would violate the federal Constitution.

In the Vermont trial court, the parties filed cross-motions for summary judgment limited to respondents' theory that the PSAs were *ultra vires* under state law. The trial court agreed with petitioner that the contracts were authorized by state law and dismissed respondents' complaint on that ground. Accordingly, it was unnecessary for the parties to brief, or the court to reach, petitioner's federal constitutional contentions.

On respondents' appeal, the Vermont Supreme Court reversed the trial court's state-law ruling. However, without either considering petitioner's federal defenses itself or remanding to the trial court to do so, the Vermont Supreme Court ordered that "judgment for [respondents] is entered" (Pet. App. 1a, 24a). Thus, under the decision below, the Vermont Supreme Court nullified the PSAs—thereby purportedly relieving the Vermont participants of their contractual obligations and imposing the entire undertaking on parties in other states—without ever passing upon petitioner's contention that such an interpretation of state law would violate the federal Constitution. In this way, the court simply ignored the constitutional provisions upon which peti-

tioner relied that are designed to prohibit state interference with vested property rights and to guard against local parochialism that favors in-state over out-of-state interests.

2. The Vermont Supreme Court offered no reason whatsoever for failing to allow consideration of petitioner's federal claims in any state court. The court's unexplained and inexplicable action in entering final judgment against petitioner without adjudicating its federal defenses is constitutionally impermissible.

To begin with, as the petition demonstrates (at 12-14), the Vermont Supreme Court's foreclosure of petitioner's federal claims violates procedural due process. The Due Process Clause, of course, "protect[s] * * * defendants [seeking] to protect their property" and prohibits a court from resolving a lawsuit " 'without affording a party the opportunity for a hearing on the merits.' " *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 429 (1982). This Court's "decisions have emphasized time and again * * * [t]hat the Due Process Clause grants * * * [a] party the opportunity to present his case and have its merits fairly judged" (*id.* at 433). To deprive petitioner of its property interest in the PSAs without considering its federal defenses is flatly inconsistent with the most rudimentary principles of due process. See also P. Bator, D. Meltzer, P. Mishkin, & D. Shapiro, *Hart & Wechsler's The Federal Courts and The Federal System* 604-605 (3d ed. 1988).

What is more, under the Supremacy Clause of the Constitution, state courts are not free to ignore rights protected by federal law or to refuse to entertain federal defenses. See, *e.g.*, *Testa* v. *Katt*, 330

U.S. 386 (1947); *FERC* v. *Mississippi*, 456 U.S. 742, 760-761 (1982). State courts are " 'bound to guard and protect rights secured by the Constitution' " (*Duckworth* v. *Serrano*, 454 U.S. 1, 3-4 (1981)), and "it is the duty of the [state] courts to adjudicate [federal claims]." *Jackson* v. *Lykes Steamship Co.*, 386 U.S. 731, 735 (1967). Because "constitutional rights [may be] denied as well by the refusal of the state court to decide the question * * * as by an erroneous decision of it" (*Lawrence* v. *State Tax Comm'n*, 286 U.S. 276, 282 (1932)), the judgment of the Vermont Supreme Court impermissibly frustrates the vindication of federal constitutional rights.

The Vermont Supreme Court gave no excuse—and had none—for failing to allow consideration of petitioner's federal constitutional claims. It is beyond question that petitioner properly raised its federal defenses below. To be sure, the trial court proceedings initially focused solely on the state-law issues and deferred the affirmative federal defenses to a later stage should their resolution prove necessary. Accordingly, petitioner advised the Vermont Supreme Court that "[i]f this Court does not affirm the judgment [of the trial court on the state-law grounds], the case should be remanded for determination by the trial court of the issues not previously addressed." Petitioner's Vt. S. Ct. Br. 21. And when the Vermont Supreme Court's decision pretermitted any consideration of the federal issues, petitioner promptly filed a motion for reargument pointing out the error, which the court simply denied without comment. See Pet. App. 27a (contending in the motion for reargument that "[i]nvalidating the PSAs on the basis of Vermont law impermissibly burdens interstate commerce and violates the Takings Clause and the Due Process Clause of the United States Constitution").

In the procedural posture of the case below, and in the face of petitioner's brief and motion for reargument, the Vermont Supreme Court's failure to allow consideration of petitioner's federal constitutional defenses was plainly erroneous. The Vermont Supreme Court entered final judgment in this case despite the fact that *no* court had *ever* reviewed petitioner's federal claims. And in thus precluding litigation of those issues, the Vermont Supreme Court was utterly silent and did not give *any* reason to justify its result. This Court should not tolerate such a manifestly unfair and entirely unexplained outcome.

3. The Vermont Supreme Court's failure to allow adjudication of petitioner's federal claims is particularly unwarranted and inequitable here, because those claims raise a substantial legal question: whether the federal Constitution protects against a state court's abrogation of long-term contracts used to finance bonds for power generating systems. Legal stability and predictability are essential to the viability of the bond market and the property rights of bondholders, as this Court previously has recognized. See, *e.g.*, *Phoenix* v. *Kolodziejski*, 399 U.S. 204, 214 (1970) (retroactive application of a decision invalidating municipal bonds "would be unjustifiably disruptive"); *Cipriano* v. *Houma*, 395 U.S. 701, 706 (1969) ("[s]ignificant hardships would be imposed on cities, bondholders, and others connected with municipal utilities if our decision today were given full retroactive effect").[1] As petitioner discusses

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[1] See also *Hill* v. *Stone*, 421 U.S. 289, 301 (1975); *Lemon* v. *Kurtzman*, 411 U.S. 192, 203 (1973); *Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 108 (1971); *Chicot County Dist.* v. *Baxter State Bank*, 308 U.S. 371 (1940).

(Pet. 14-20), there are substantial arguments that the nullification of the PSAs violates the federal Constitution. Nevertheless, the Vermont Supreme Court has allowed respondents to walk away from their commitments without so much as a mention of the constitutional questions presented.

Furthermore, these constitutional issues are of considerable public importance. "[C]ontracts containing take-or-pay provisions are common for the electric industry generally and in Vermont in particular" (Pet. 8). Thus,

> the contracts challenged here are substantially the same as, and in some instances virtually identical to, numerous other contracts under which a great many municipal and cooperative utilities both in Vermont and across the nation obtain power * * *.
>
> * * * * *
>
> "[Such] contracts are the norm, not the exception in joint generating ventures * * *."

Petitioner's Vt. S. Ct. Br. 1-2, 14 n.13 (quoting findings of the Vermont Public Service Board). Take-or-pay contracts "are a principal means by which many New England utilities meet their capacity requirements on a long-term basis" (Pet. 6), and at least three other projects involving Vermont participants have comparable take-or-pay provisions (see petitioner's Vt. S. Ct. Br. 15).

In light of the clear error and blatant unfairness of the Vermont Supreme Court's decision, and in light of the significance of the federal issues involved, the judgment below should not be permitted to stand.

B. This Court May Wish To Summarily Vacate The Judgment Below And Remand The Case To The State Courts For Consideration Of Petitioner's Federal Constitutional Defenses

In our view, further briefing and argument are unnecessary to demonstrate the palpable error that infects the Vermont Supreme Court's judgment. Accordingly, as an alternative to plenary review, this Court may wish to consider summarily vacating the judgment of the Vermont Supreme Court and remanding the case to the state courts to pass upon petitioner's federal constitutional defenses. A remand would remedy the harsh and indefensible result reached below and, at the same time, would afford the state courts the opportunity to address those federal issues in the first instance. See 28 U.S.C. § 2106 ("[t]he Supreme Court * * * may * * * modify, vacate, set aside or reverse any judgment * * * brought before it for review, and may remand the cause and direct the entry of such appropriate judgment * * * or require such further proceedings to be had as may be just under the circumstances").

Rule 23.1 of the Rules of this Court specifically provides that the Court may act on a petition for certiorari by entering "a summary disposition on the merits." Such summary disposition is appropriate "[i]f the Supreme Court considers the decision below to be clearly wrong but not worthy of oral argument." R. Stern, E. Gressman, & S. Shapiro, *Supreme Court Practice* 286 (6th ed. 1986). Summary action is warranted here to wipe the slate clean of the final judgment below and allow the state courts to decide petitioner's constitutional claims on the merits. See, *e.g.*, *Dennison Mfg. Co.* v. *Panduit Corp.*, 475 U.S. 809 (1986) (per curiam) (summarily vacating the

judgment below and remanding the case to the court of appeals to consider an issue that it had originally failed to address).

A remand to the state courts would not prejudice any legitimate interest of respondents. Rather, they simply would have to litigate the federal defenses that petitioner raised as early as its answer to the complaint. There is certainly nothing unfair in requiring that the merits of these federal issues be resolved before respondents can seek a final judgment in their favor.

CONCLUSION

The failure of the Vermont Supreme Court to consider petitioner's substantial federal defenses before entering final judgment was entirely unjustified and represents a serious injustice that frustrates petitioner's constitutional rights. Moreover, the federal issues involved have important consequences not only for the power project in this case but for a number of other projects in New England and around the country. In these circumstances, the Court should grant the petition and, at a minimum, remand the case to enable the state courts to consider petitioner's federal claims.

Respectfully submitted.

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